

**Caffe Giovanni, Inc. d/b/a Giovanni's and Local 28, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO and Gail E. Wetzel and Joseph C. Krivan.** Cases 32-CA-2000, 32-CA-2234, and 32-CA-2284

November 13, 1981

### DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On March 4, 1981, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, Joseph C. Krivan, a Charging Party, filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Caffe Giovanni, Inc. d/b/a Giovanni's, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>1</sup> Charging Party Joseph C. Krivan has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees concerning their union membership, activities, and desires and the union membership, activities, and desires of their fellow employees.

WE WILL NOT promise our employees economic and other benefits in order to dissuade them from joining or assisting a union.

WE WILL NOT threaten retaliation, deportation, or other unspecified reprisals against our employees to dissuade them from joining or assisting a union.

WE WILL NOT solicit grievances from employees and promise possible favorable resolution of them in order to induce them to refrain from joining or assisting a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

CAFFE GIOVANNI, INC. D/B/A GIO-  
VANNI'S

### DECISION

#### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This case was heard before me in Oakland, California, on May 28, 29, and 30 and June 3, 1980, pursuant to an amended consolidated complaint in Cases 32-CA-2000, 32-CA-2234, and 32-CA-2284, issued by the Regional Director for Region 32 of the National Labor Relations Board, on April 16, 1980, pursuant to an original and first amended charge in Case 32-CA-2000, filed by Local 28, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, on August 3 and September 6, 1979, respectively; a charge in Case 32-CA-2234, filed by Gail E. Wetzel, an individual, on November 1, 1979; and a charge in Case 32-CA-2284, filed by Joseph C. Krivan, an individual, on November 20, 1979. The amended consolidated complaint alleges, in substance, that Caffe Giovanni, Inc. d/b/a Giovanni's, herein called Respondent, violated Section 8(a)(4), (3), and (1) of the National Labor Relations Act, herein called the Act, by discharging employees Krivan and Erich Frisch and by assigning Krivan to less desirable work stations and Section 8(a)(1) of the

Act by interrogating employees as to their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees; by threatening reprisals against employees because of their union activities; by offering a raise and permanent employment to an individual in order to weaken his support for the Union; by soliciting grievances and suggesting their favorable resolution in order to cause employees to abandon their support for the Union; by telling employees that it will pay for an outside arbitrator if employees agreed to the formation of an in-house union and abandoned support for the Union; by threatening employees with a warning letter; by offering to change the work schedules of employees in order to induce them to abandon support for the Union; by threatening unspecified harms if the Union was victorious in a representation election; and by condoning a pattern of employee harassment and denigration of union adherents. Respondent filed an answer, denying the commission of any unfair labor practices. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Extensive briefs were filed by counsel for the General Counsel and by Respondent, and both have been carefully considered. Upon the entire record in the case, and from my observation of the demeanor of the witnesses, and having carefully considered the post-hearing briefs of the parties, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a California corporation, maintains an office and principal place of business in Berkeley, California, where it is engaged in the ownership and operation of a restaurant and bar. During the 12-month period immediately preceding the issuance of the amended consolidated complaint, Respondent, in the normal course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods or services valued in excess of \$5,000, which goods or services originated outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. ISSUES

1. Whether from on or about August 15, 1979,<sup>1</sup> until September 1, 1979, Respondent assigned employee Joseph Krivan to less desirable work stations in violation of Section 8(a)(4), (3), and (1) of the Act?

2. Whether on or about September 1, Respondent discharged or caused the termination of Krivan in violation of Section 8(a)(4), (3), and (1) of the Act?

<sup>1</sup> Unless otherwise stated, all dates herein are in 1979.

3. Whether on or about September 5, Respondent discharged employee Erich Frisch in violation of Section 8(a)(3) and (1) of the Act?

4. Whether from on or about July 8 until on or about September 5, Respondent engaged in the following acts and conduct violative of Section 8(a)(1) of the Act:

(a) Interrogating employees about their union membership, sympathies, and activities and the union membership, sympathies, and activities of their fellow employees?

(b) Threatening reprisals against employees because they engaged in union activities?

(c) Offering employees financial, employment, and other inducements in order to weaken support for the Union?

(d) Threatening a raid and potential deporting by the Immigration and Naturalization Service if employees vote for the Union?

(e) Soliciting grievances and promising their favorable resolution in order to cause employees to abandon support for the Union?

(f) Promising to pay for the services of an outside arbitrator if employees consented to the establishing of an in-house union in lieu of support for the Union?

(g) Threatening to give employees warning letters because of their union activities?

(h) Offering to change employee work schedules in order to induce them to abandon support for the Union?

(i) Condoning a pattern of general harassment and denigration of union adherents?

#### IV. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Facts

##### 1. Events preceding August 15, 1979

Respondent is a corporation engaged in the operation of an Italian-style restaurant and bar in Berkeley, California. John Schipani owns all the outstanding shares of stock in the corporation and his wife, Anna Schipani, is a vice president and is on the board of directors. Both individuals are at the restaurant several times a week and, according to Anna, "While I'm there I help out and do what I can." Howard Pitter is the general manager of the restaurant and normally works during the evening shift. Pat Roberts is the manager during the day shift. Apparently, Pitter is responsible for the overall operations of the restaurant; however, during her shift, Roberts has authority to hire and fire and to direct the work. As part of his duties, Pitter prepares the daily work schedule for the employees, including the waiters. There are two head waiters at the restaurant—Chan Chaikow and George Loung. Chaikow testified that along with waiting on tables, he is responsible for assigning the waiters to the various work stations—or sections—in the restaurant each day,<sup>2</sup> ensuring that proper service is ac-

<sup>2</sup> The work station assignments are made in conjunction with the waiters' work schedules. For example, if a waiter is scheduled to work on a particular night from 6 p.m. until 1 a.m., Chaikow will assign that individual to a work station which requires the waiter in that section to work until closing time—1 a.m.

corded to the restaurant customers, assigning breaktimes to the waiters, and checking that the waiters are performing the side work—i.e., stocking the salad bar—that goes along with the work station to which they are assigned.<sup>3</sup>

The record discloses that the restaurant is approximately 90 feet deep and 40 to 45 feet in width. Entering the front of the facility, an open kitchen area is to the right and the cocktail lounge and bar is to the left. Continuing down the left side of the restaurant, between the bar and the main wait station is a raised area, called the "sidewalk," on which eight dinner tables are located. Opposite this area is a wine arbor. Continuing through the restaurant, one enters into the main body of the dining area. On the right side is a fireplace with dinner tables arranged around it. At the rear of the dining room is an area, called the "boathouse," containing 9 or 10 tables. Also located in the back area are two restrooms and another wait station. The central dining area has been artificially divided by Respondent into six waiter stations—with responsibility for an approximately equal number of tables of varying sizes. The corners are designated as sections A and D (on the left side) and B and E (on the right side). The center tables are divided into center right and center left. In the normal waiter configuration, one waiter is assigned to each station. The record further discloses that the facility has a second floor wherein the restaurant office and an employee lounge are situated.

The record reveals that union discussions amongst the restaurant employees commenced in late June as an alternative for solving perceived work problems. Eventually, waiters Joseph Krivan<sup>4</sup> and Bernard Cacho contacted the Union and arranged a meeting. Thereafter, the two waiters met with business agent Roger Cardenas outside another Berkeley restaurant. Cacho and Krivan related the employee problems, and Cardenas explained organizing procedures to them. Either then or at a subsequent meeting, Cardenas gave authorization—or pledge—cards to Krivan and Cacho and explained their use. During the next 2-week period, the two employees distributed and collected signed authorization cards from the waiters, cooks, and other employees. According to Krivan, he personally distributed and collected 12 signed cards during breaks at the restaurant or after work. Cacho and Krivan returned the signed cards to the Union, and on July 9, based upon the authorization cards, the Union filed a representation petition with Region 32 to represent certain of Respondent's employees, including the waiters and the cooks.

While there is no direct evidence that Respondent was aware of the activities of either Krivan or Cacho, the record establishes that Respondent was indeed aware of the incipient union organizing campaign prior to the filing of the election petition. Thus, Howard Pitter vaguely recalled that on the day before the Union noti-

fied Respondent of its representation status, he spoke to employee Peter Paccone,<sup>5</sup> who "asked me if I knew anything about unions . . ." From this conversation, Pitter admittedly knew that some sort of union movement among the employees was ongoing. Further, Erich Frisch, who had been hired by Pitter on July 5 as a replacement for a vacationing cook, testified that on July 7 at approximately 4:30 p.m., Pitter called him into his office and asked, "Did you know that somebody's trying to bring a union into the house? Or have you heard any talk about the Union?" Frisch replied that he had heard some talk about it, and Pitter responded, "Well, somebody's trying to bring the union into the house." Later, after informing Frisch that union benefits were not as good as those paid by Respondent, Pitter said that he believed a waiter was trying to "make 500 easy bucks" by bringing in the Union and that something would happen to the "Mexicans in the dish room" if the Union came in.<sup>6</sup> Pitter denied the conversation. However, as between Pitter and Frisch, I generally credit the testimony of Frisch whose demeanor while testifying was, for the most part, that of an honest and candid witness.

The record further establishes that subsequent to the filing of the aforementioned representation petition, Pitter and Anna Schipani immediately embarked upon a course of conduct designed to uncover the identities of the primary union adherents and to quell the nascent campaign. Thus, Bernard Cacho testified that on July 10, 1 day after the filing of the petition, he overheard a conversation between Anna Schipani and a busboy-dishwasher, named Carlos ———, in the employee lounge. According to Cacho, the conversation lasted between 5 and 10 minutes, and "she asked Carlos if he knew anything about the union. He said not really. . . and she said she would like to know who started it." After evading an answer for a few moments, Carlos mentioned employee Bill Francisco and a bartender named Mario ———. Anna ended the conversation by saying, ". . . don't you know if the union comes in here, the immigration is soon to follow. They'll take all the illegals away." Anna Schipani recalled a meeting among herself, Carlos and three or four other employees in the dishroom "after I heard that there was . . . cards being distributed or signed. . . ." While denying that Cacho was even present, that she asked who started the Union, or that she threatened a possible immigration raid, Anna testified, "I wanted to know if there was a problem with the people in the dishroom. . . . If they felt they weren't being paid enough or if they wanted more or expected more. . . . the thing I wanted to tell them was that they had to understand what they were getting involved in with the union. . . . If you had a union come into the restaurant, did these boys have to

<sup>3</sup> The complaint alleges and Respondent admits that John and Anna Schipani and Howard Pitter are supervisors within the meaning of Sec. 2(11) of the Act. It is not alleged that Chaikow is either a supervisor or an agent of Respondent.

<sup>4</sup> Krivan had been employed by Respondent as a waiter since October 1977.

<sup>5</sup> Peter Paccone is a college student who works as a cook for Respondent. He earns \$4.75 per hour and is one of the lowest paid cooks. Paccone placed this conversation as occurring prior to the filing of the election petition and shortly after being asked by Krivan if he would support the Union. I was impressed by Paccone's demeanor while testifying and shall credit him herein.

<sup>6</sup> The record discloses that Respondent employs many individuals of Spanish descent as busboys and kitchen help and that several may have been in this country illegally.

have green cards. . . ." As between Cacho and Anna Schipani, I credit the testimony of Cacho, who, unlike the latter, has no interest in the results of this proceeding and impressed me, for the most part, as being a forthright and credible witness.

Joseph Krivan testified that on July 11 he overheard a conversation between Pitter and a waiter, Jose Cruz, in the back of the dining room. As Krivan approached, "Howard was asking Jose if he had signed any pledge cards, and Jose denied it. . . . Howard then asked him if he had seen any pledge cards. Jose said no. Then Howard asked him did he know that the Union was trying to get into the restaurant?" Jose gave a vague reply, and "Howard asked him how did he feel about that?" Again, Jose gave a noncommittal response, and Pitter asked, "if there's an election, how do you think you'll vote?" After Cruz obligingly replied that he would probably vote "no," Pitter said, "Well, if you have any gripes or complaints, let me know about them." That night or the next day, according to Krivan, he overheard a similar conversation between Pitter and waiter Pow Purgsaphakorn, at the main wait station. "I heard Howard asking Pow if he had signed a pledge card? Pow responded, 'No.'" Pitter then asked Pow if he had heard that the Union was organizing the restaurant. Pow again denied knowledge, and Pitter persistently asked how Pow felt about it. Pow replied that he did not support the campaign. Pitter then ended the conversation, asking if Pow had any complaints or problems and if so, to let him know about them.

Howard Pitter denied both the occurrence and the substance of the aforementioned conversations. According to Pitter, he never initiated any conversations with employees about the Union. Rather, he averred that he made himself available to "employees that wanted to know more about it. . . . I knew what my legal limitations were about . . . and I had the book . . . the green book, the book of Local 28's bylaws, wages, different specific things and I made that available to anyone. . . ." I note herein that Pitter and Krivan conflict in many testimonial aspects. I was not particularly impressed with the demeanor of either witness, believing that each was more than capable of fabricating responses in order to buttress his respective position. Accordingly, where they conflict, I have credited that testimony<sup>7</sup> which best harmonizes with the surrounding circumstances and which is internally consistent and not inconsistent with the testimony of others. Concerning the above conversations, inasmuch as the conduct of Pitter is consistent with his earlier credited interrogation of Frisch and as Anna Schipani engaged in similar conduct, I credit Krivan as to Pitter's conversations with Cruz and Purgsaphakorn.

One day in the last week of July, Krivan<sup>8</sup> and Cacho spoke to Day and Manager Pat Roberts, complaining

about alleged harassment of employees by Pitter and seeking Roberts' help in arranging a meeting with John Schipani, who, they were aware, was scheduled to leave for a European vacation shortly thereafter. During their conversation, Roberts gave to the waiters a document, which purportedly was a copy of a financial report on the Union and which was in the files of the Department of Labor. The meeting ended with Roberts promising to contact Schipani. Later that day or the next day, Cacho and Krivan met with John Schipani at approximately 2 p.m. in the main dining room, and they spoke for approximately 30 minutes. According to Krivan, they told Schipani that "we were very concerned at the harassment . . . of the employees, and that we wanted an end to it; that we were concerned of anyone being fired while he was gone, at which point . . . we'd put up a picketline." Krivan named Pitter as the source of the harassment, detailing the latter's alleged interrogation of the employees regarding the Union. Schipani replied "that he didn't want to stand in the way of what a majority of employees wanted, but he didn't want a union there." At that point, Krivan referred to the Union's financial statement and expressed concerns about the Union "that perhaps they might not be able to support us . . . but we would still fight [and] . . . we wanted a fair expression of viewpoints so we could have the election, and may the best man win. John felt that was—well, he didn't disagree with that. He said while he was gone that if anything happened, to refer to Pat Roberts. She would be acting on his behalf to cool any kind of situations from exploding. However, Mr. Schipani did emphasize that he didn't want a union there; perhaps we might be interested in something like a house union or some kind of employees' grievance committee that would have an outside arbitrator to be paid by him to settle affairs that couldn't be settled between the two parties, instead of the union. I said I wasn't in a position to negotiate that kind of an offer; but I would certainly communicate it to the other employees." The meeting ended at that point.

During his testimony, Bernard Cacho gave a similar—but more complete—version of this conversation. According to Cacho, he and Krivan began the meeting by expressing doubts about the viability of the Union "but that [the Union] was who we started with and we had to stick with them." Schipani replied that local business friends told him that "the union, wasn't such a hot thing. . . ." Cacho replied that it would not be a good thing for Schipani but might be good for the waiters. Schipani replied that the Union would not help the employees and, at that point, raised the subject of an in-house union. "He said, I've had what they call an in house union . . . and it seems to work better for everybody involved." Schipani mentioned as an incentive that ". . . if we paid dues within our own in-house union, then the money would . . . stay within Giovanni's. . . ." Schipani added that he "would even be willing to pay for an outside arbitrator to come in and work out the differences and settle the matter and then we could have this in-house union. . . ." Krivan and Cacho agreed that what Schi-

<sup>7</sup> The crediting of portions of witnesses' testimonies is required under the circumstances of this case and does not require rejection of their entire testimonies. *Carolina Cannery, Inc.*, 213 NLRB 37 (1974). "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Company*, 187 NLRB 3, 4 (1970), enf'd. 437 F.2d 502 (5th Cir. 1971).

<sup>8</sup> Krivan made no real effort to hide his role as a strong union adherent. Thus, on July 16, he posted campaign literature on the employee bulletin board and on July 25 he posted a notice, advising employees of a

union meeting at his home. Moreover, Pitter admitted, "It was common knowledge that John and Bernard were organizing a union."

pani mentioned was a possibility but that since the employees had signed authorization cards for the Union, it was their decision whether or not to continue supporting the Union. Next, Krivan and Cacho raised the matter of Pitter's campaign conduct. Cacho said that he wanted such activities stopped, for Pitter's conduct was merely exacerbating an already tense situation. Schipani replied, "if anyone gets a hair up his ass, just go to Pat, she's my direct line and you talk to her and any problems you have, bring to her."

Schipani testified that Roberts telephoned him on the morning of the day on which he was scheduled to fly to Monte Carlo and that without any idea why Krivan and Cacho wanted to speak to him, he postponed his flight reservations to meet with them. According to Schipani, the entire conversation lasted just 10 minutes, with Cacho doing most of the talking. He was very apologetic about starting the union, or trying to get a union in there. . . . they found out that Local 28 was not what they wanted, and they were just going to drop the whole thing. Cacho then told Schipani to go on vacation and don't worry "because there won't be a union." Schipani denied that anything was mentioned regarding the interrogation or harassment of employees and stated that Cacho initially raised the subject of other unions, including a possible in-house union. On the latter point, Schipani told the waiters that an in-house union, Avanti Popolo, had once represented Respondent's employees and that the former's collective-bargaining agreement with Respondent included an arbitration procedure.<sup>9</sup> Schipani concluded by advising Krivan and Cacho to speak to older employees as to how the in-house union operated.

I find Schipani's account of his conversation with Krivan and Cacho rather incredible, believing it extremely unlikely that Krivan and Cacho, both of whom had expended much effort in organizing and directing the union campaign, would abruptly renounce the Union—and, in effect, their efforts—to the restaurant owner or that Schipani would postpone a pending European vacation for an employee meeting about which he knew nothing. Accordingly, I credit Cacho's more complete account of this incident, as materially corroborated by Krivan.

Also in the last week of July, as predicted by Pitter and Anna Schipani, the Immigration and Naturalization Service conducted a raid on the restaurant, and two employees were taken away for possible deportation. According to Krivan, at approximately 11:30 p.m. on the day he and Cacho met with Schipani, Pitter approached him at his work station,<sup>10</sup> accused him of telling employees that Respondent was responsible for the raid, and stated that he was investigating the matter. Thereafter, the events of that evening are basically uncontroverted. Thus, 20 minutes later, Krivan observed all the Spanish-

speaking busboys and kitchen help assembling in the boathouse area for a meeting with Pitter. Inasmuch as he did not speak Spanish but Cacho did and as he believed the meeting concerned the aforementioned raid, Krivan immediately left his area, used a pay telephone near the restrooms,<sup>11</sup> and called Cacho who was off work that night. Because Krivan did not know the subject matter of the meeting, Cacho asked to speak to Sergio, one of the restaurant busboys. Thereupon, Krivan walked over to the boathouse and, after initially failing, managed to communicate to Sergio that Sergio was wanted on the telephone. After Sergio picked up the receiver, Krivan resumed his waiter duties.

Meanwhile, Pitter, who intended to inform the Spanish workers that "we were sorry that something like this [had] happened," began the meeting by telling the assembled employees, through an employee-interpreter, that the meeting had nothing to do with the Union. At that point, Krivan interrupted the meeting by gesturing to and telling Sergio about the telephone call. While the latter was gone, Pitter said nothing to the employees but upon Sergio's return told the group how sorry he was that two of them had been taken away by the Immigration Service. Before he could say anything more, Cacho, whose residence is nearby the restaurant, came into the boathouse area and sat down in back of the assembled employees. Pitter looked at Cacho, told him the meeting would last only a few minutes, and asked him to wait outside. Cacho replied that he wanted to stay, hear what was said, and interpret if necessary. They then began to argue, with Pitter demanding that Cacho leave the area and Cacho refusing. Finally, with neither one conceding, Pitter threatened to call the police but abruptly changed his mind and just dismissed the meeting.<sup>12</sup> Cacho then walked away, and as Pitter passed by, Cacho either called him "a pig," as admitted by Cacho, or "asshole," as contended by Pitter.

The next afternoon, Krivan and Cacho spoke to Pat Roberts in the dining room and explained their version of the previous evening's events. At approximately 2 p.m., Pitter came downstairs from his office and gave to Krivan and Cacho disciplinary letters concerning the night before. The letter to Krivan accused him of generally disrupting the restaurant and stated that the letter would be placed in his personnel file; Cacho's letter stated that he was being suspended from work for a week "because of disruptive activities or disruptive behavior . . . and that . . . [if repeated] . . . I would be fired."<sup>13</sup> After reading the letters, Krivan and Cacho de-

<sup>11</sup> Krivan reluctantly admitted that he was aware of a work rule prohibiting use of this telephone by employees. Krivan also denied that he was away from his work station while he telephoned Cacho. According to him, "the entire restaurant is my station. . . ."

<sup>12</sup> As he observed Cacho pass through the dining room and into the boathouse, Krivan walked over to the edge of the boathouse area, which is adjacent to section E, and stood watching. Krivan testified that he was able to keep his entire area in view and that just one table was occupied at the time. As to what he was doing while watching the boathouse confrontation, Krivan stated, "I was working," but he could not recall what he was doing—other than watching.

<sup>13</sup> Pitter maintained that he felt "intimidated" by the conduct of Krivan and Cacho the previous night and that they had been "trying to make something out that wasn't really anything." Further, Pitter attributed their conduct to believing that he was going to speak about the Union.

<sup>9</sup> In 1970, the Board conducted a representation election involving Respondent, the Union and an employee labor organization, Avanti Popolo. The latter received a majority of the votes and ultimately negotiated a collective-bargaining agreement with Respondent. The record is unclear as to the demise of Avanti Popolo.

<sup>10</sup> That night, Krivan was working in sec. E, which is the waiter station at the right rear of the main dining room.

manded that Pitter be more specific as to what exactly the waiters did to warrant discipline. Pitter agreed to do so, said that the new letters would be available that night, and went upstairs to his office. Shortly thereafter, Cacho and Krivan left the restaurant.<sup>14</sup>

At approximately 7:30 p.m., Krivan and Cacho returned to the restaurant and met with Pitter in the dining room. The subject matter of this meeting is in dispute. According to Krivan, he began by asking Pitter for the revised warning letter, and Pitter responded that he had changed his mind and would forget the incident "out of the goodness of his heart." Not willing to let the matter rest, Krivan replied that what had occurred was a matter of employee rights and that Respondent had committed an unfair labor practice by calling a general employee meeting without giving the Union a chance to respond. Pitter repeated that he wanted to forget the entire incident and had decided to destroy the warnings. Krivan responded, stating that he was upset with the way Pitter was harassing and interrogating employees. Pitter did not answer that accusation but again responded that it would be a good idea to forget the entire matter. Refusing to do so, Krivan replied that the incident was a matter of employee rights and that he would not just forget what happened. The meeting ended with Krivan and Pitter agreeing "to let things cool down" and with Pitter agreeing to place a note in Krivan's file regarding what had transpired.<sup>15</sup>

According to Cacho, Pitter began stating that he would not discipline either Krivan or Cacho for the incident. Cacho said that he felt there was no reason for the letters, and Pitter responded that whatever the reason, he just wanted to forget the incident and to "sit down and work on the real problems and . . . what grievances we had. . . . we could resolve and come to some amenable ends." They then discussed a waiter, named Steve, regarding an assignment problem, and the conversation ended.

Pitter's recollection of this conversation was rather brief but more corroborative of that of Krivan than the testimony of Cacho. Thus, according to Pitter, "I told them I had thought about it and I had decided not to go ahead and give them the letters and, you know, can't we just . . . work together." Pitter did recall that the meeting ended amicably. Because Krivan and Cacho conflict, I do not credit Cacho's testimony that Pitter offered to adjust any problems or grievances; however, because his testimony was more complete about what apparently was a lengthy conversation, I credit Krivan's version of the meeting, specifically noting his rather belligerent attitude.

Krivan next testified during direct examination that on Sunday, August 12, he observed Pitter arrive at the restaurant at approximately 5 p.m. and, with his small, red schedule book, proceed "to ask all the employees for changes in their schedules." When asked to specify to which employees he overheard Pitter speaking, Krivan

named three cooks—Dave Catlett, Carl Datz, and Peter Paccone—and two waiters—Don Jackson and one other. Finally, Krivan averred that the above had never before been done by Pitter.<sup>16</sup> During cross-examination, Krivan's testimony became inconsistent. Thus, when asked to repeat exactly what he overheard Pitter saying to the above-named individuals, Krivan admitted that "I didn't hear Howard say anything directly to anyone there" and that all he observed was Pitter approaching a number of employees, carrying the red schedule book. Later, Krivan testified that he observed Pitter walking throughout the kitchen, dining room, and main wait station, approaching "everyone in the kitchen and several wait people," and that he knew what Pitter asked each employee based upon reports to him. Further during cross-examination, Krivan reverted back to his original testimony saying, "I believe I did overhear [Pitter] asking one or two people about the changes in the schedule." Specifically as to Dave Catlett, Krivan suddenly recalled that Pitter asked whether he wanted any changes and that Catlett replied, not right then. The subject matter was dropped on cross-examination after Krivan claimed that he could recall none of the other conversations. Remarkably, however, on redirect examination, Krivan was able to remember two other employees to whom Pitter spoke regarding schedule changes and that to each, Karl Moeslieu, a kitchen aide, and Jose Cruz, Pitter asked if he wanted any schedule changes. Pitter specifically denied the aforementioned conduct and, based upon Krivan's utterly contradictory testimony, I credit the denial. Accordingly, I shall recommend that paragraph 6(m) of the amended consolidated complaint, which concerns the aforementioned alleged conduct, be dismissed.

As a result of the Union's petition, a representation election was scheduled for August 15. According to Cacho, he had a conversation with Anna Schipani at approximately 7 p.m. near the cashier's stand on the night before the election. Anna, who had never spoken to Cacho at length before, called him over and asked, "what do you think of the union . . . [and] I replied don't you know all Mexicans are union members. She said . . . if the union wins, I wouldn't want to be you. . . . Johnny's a nice guy and he really looks after his employees. He's such a good guy that I know if the union wins, God's going to get you in some way or another." Cacho, who took her comments "sort of in jest," responded in a flippant manner, "and she said, no I mean it. . . . I don't understand why you're doing this to him. I said, doing what? And she goes, this whole union thing." The conversation continued with Anna saying that she did not understand why Cacho, who had been employed for just a year and a half, would try to bring in a union. Cacho replied that if the employees believed her husband was "such a great guy," they would not vote for the Union. The meeting concluded with Anna reiterating "that if the union came in or even if Giovanni's lost or won by a slight margin, she wouldn't want to

<sup>14</sup> Cacho testified that after he returned to his apartment, Pat Roberts telephoned and said that Pitter had decided against giving them warning letters and just wanted to discuss the issues with them that night.

<sup>15</sup> The note reads as follows: "Joe Krivan has had no letters of disciplinary action, and his file contains only employee related information."

<sup>16</sup> According to Krivan, in the past employees were never consulted about their hours; rather, employees were scheduled according to need. As to changes, waiters could ask for a change in writing and Respondent, in its discretion, could act thereon.

be in my shoes. . . ." The conversation ended on that note.

Anna Schipani admitted having such a conversation. Thus, she testified that she spoke first, calling Cacho a nice guy and asking, "How did you get involved in this?" Cacho responded that all Mexicans are union people. Anna then asked Cacho for his age; he replied that he was 24 years old and asked why she wanted to know. Anna responded that Cacho did not know what he was doing, that her husband had been in the restaurant business his entire life, and that the Union was a Hitler-like organization, which was only interested in taking over the restaurant. Then she asked why the employees had not gone to her husband first if there were problems. Finally, while denying warning that she did not want to be in Cacho's shoes if the Union won, Anna admitted saying, "It isn't fair to John and God is going to punish you, Bernard." As between Anna Schipani and Cacho, as previously mentioned, I found the latter to be a more candid and truthful witness and, therefore, I credit his version of the aforementioned conversation.

## 2. The alleged postelection harassment

The election was held as scheduled, with an apparent majority of employees voting against representation by the Union.<sup>17</sup> On August 22, the Union filed objections to the election with Region 32 and, when Respondent received a copy of said objections, Pitter immediately posted the document on the employee bulletin board. According to Krivan, he asked several employees if they would cooperate in the Board's investigation of the objections. He did this in the restaurant, and he also gave an affidavit regarding Respondent's preelection conduct. While Krivan testified that these activities were confidential, Pitter admitted that he believed the sources for the alleged objectionable conduct were Krivan and Cacho.

The amended consolidated complaint alleges that subsequent to the election, Respondent commenced a pattern of unlawful discrimination by assigning Krivan to less desirable work stations than he had previously been assigned. Echoing this allegation, Krivan asserts, "I was scheduled to a number of smaller sections than I had been accustomed to working." The record evidence is as follows. Krivan testified that some waiter stations are larger or otherwise more desirable than others and that these include sections A, B, D and the boathouse. He further identified the smaller, less desirable sections as E, C, and the sidewalk—if more than one person is waiting on tables. Regarding the more desirable sections, Krivan stated that Respondent's policy was to place the better waiters on "stronger sections because you need those people to take up the maximum volume of tables you're going to be having if it's going to be a busy night." As to those sections which he felt were slower and less desirable, Krivan bluntly testified that these "are the crap sections because you get stuck with all sorts of side work to do. You have less tables. Everybody knows that you are stuck when you get that kind of a section."

Krivan testified that assignments to the various waiter stations are made on a rotating basis. Notwithstanding this system, he asserted that since the spring of 1979 he had regularly been assigned to the larger, faster moving waiter stations<sup>18</sup> but that after the election, "every shift I worked, I was at a less active section." In Krivan's opinion, the less active sections had fewer tables and were not being seated as often by the restaurant hosts. Further, he testified that he began noticing that waiters, who ordinarily did not work in sections A, B, D, and the boathouse because of inexperience or ability, were working in those sections in place of himself and Cacho, who also should have been regularly assigned to those sections. As the situation became increasingly intolerable after the filing of the objections, Krivan allegedly complained to Pitter on the Wednesday following said filing—August 29. "I objected to the sections I was working. I said, 'I'm being assigned to the smaller sections. Why?' He had no answer to that." Also, according to Krivan, he complained to Chaikow on several occasions that day and on the following Friday, August 31; however, nothing was done to correct the situation.<sup>19</sup>

Cacho, who began working for Respondent in February 1978, testified that when he was first employed, he was normally assigned to the least-liked waiter stations—sidewalk, when more than one waiter, and E—but that as he gained experience and expertise, he began receiving assignments to the better sections—A, B, D, and the boathouse.<sup>20</sup> According to Cacho, this trend did not continue after the election; rather a reversal occurred, with Cacho again receiving mostly sidewalk, E, and C waiter assignments. Upset at the situation, Cacho assertedly complained once or twice a week to Chaikow, asking him why he was receiving such assignments. The latter merely responded that Cacho should not be so paranoid and that his assignments had nothing to do with the Union.

Regarding waiter assignments, head waiter Chaikow testified that he is solely responsible for such assignments, that these are prepared on a weekly basis on the Tuesday of the preceding week, and that Pitter neither plays any role in the assignment process nor orders or requests changes—unless a particular individual is sick and cannot work. As to his method of assigning waiters to particular sections, Chaikow testified that he keys the sections to the weekly work schedules which are prepared by Pitter. Thus, waiters normally work on certain days of a week, and for each day of work, Pitter assigns a shift (lunch or dinner) and the hours (5 p.m. until mid-

<sup>18</sup> According to Krivan, he had a conversation with Pitter in April or early May in which the latter told Krivan that he was a "strong waiter" and that on weekends he would be needed in larger sections "to help turn over the tables. . . ."

<sup>19</sup> On cross-examination, Krivan contradicted himself, stating that he complained to Chaikow on just two occasions after August 22. On the first occasion, Chaikow said he would do something; on the second occasion, Chaikow apologized, saying he could do nothing about Krivan's problems. Later during cross-examination, Krivan reversed himself again, testifying that he "complained to Chaikow several times after the 22nd."

<sup>20</sup> Corroborating Krivan, Cacho stated that most waiters did not like the center sections or E because of the amount of sidewalk involved, the size and composition of groups seated in those sections, and because customers just did not like those seating locations.

<sup>17</sup> Krivan was the Union's observer during the election.

night, 6 p.m. until 1 a.m., etc.). According to Chaikow, "[P]eople who were going to be scheduled to leave early would be scheduled in the center and sidewalk sections. The people who are closing will be scheduled in . . . A, D, B, and E. They'll be staying till closing."<sup>21</sup> Essentially, then, Chaikow assigns the sections around the waiters' work schedules, choosing particular sections for particular waiters "on a rotating basis." On this latter point, Chaikow testified that he divides waiter assignments into what he termed "section weeks." Each week begins with the waiter's first shift in any particular week; section assignments are rotated within that week so that the waiter does not receive the same station on any two nights or days (but the same section may be given for separate lunch and dinner shifts); and assignments in 1 week have no relation to assignments in any other week.

Regarding Krivan's work assignments from August 15 through September 1, the record establishes that he worked three separate weekly periods—August 17 through 19; August 22, 24, 25, and 26; and August 29 through September 1. While Krivan asserted that on "every shift" during this time period he worked the slower, less desirable sections (E, C, and sidewalk), the record does not support this contention. Rather, according to Chaikow's uncontroverted assignment records for this period, Krivan worked at the following stations:

<i>Date</i>	<i>Assignment</i>	<i>Shift Hours</i>
August 17	B	12—5
August 18	B	12—2
August 18	E	6—1
August 19	B	4—12
August 22	Cter Left	6—12
August 24	D	12—5
August 25	C	12—2
August 25	D	6—1
August 26	E	4—12
August 29	E	12—2
August 29	B	6—12
August 31	B	12—5
Sept. 1	D	12—2
Sept. 1	E	6—1

The most striking aspect of this chart is, of course, the number of times Krivan worked in sections B and D—sections which he and Cacho considered to be among the more desirable waiter stations. Also, one of his assignments to section D was the dinner shift on August 25. Of paramount significance is the fact that this date was a Saturday, which is the busiest night of the week in the restaurant and the night during which waiters earn the most tips. On his part, Chaikow's testimony was logical and lucid as to the various factors he considered in making the above-described assignments to Krivan. For

<sup>21</sup> Chaikow testified that waiters, who are scheduled to leave prior to closing, normally are given the centers or the sidewalk. While people may be seated in the center after the waiter has departed, said customers are picked up by the corner waiters.

example, the former testified that on September 1 he could have assigned either Krivan or Cacho to work in sections D and E and ultimately decided to assign section D to Cacho inasmuch as the latter was scheduled to start earlier and as the left side was normally seated first.<sup>22</sup> Moreover, as proof that Chaikow did, in fact, follow a rotation system in assigning sections is his notebook of assignments. Analysis thereof discloses that all waiters who were assigned to sections A, B, D, and the boathouse also worked in the undesirable sections—C and E. Finally, with regard to section A, Krivan maintains, and the record corroborates, that he was not assigned to that section after August 15. However, the record also discloses that he was not assigned to this section at any time from August 1 through August 15, a period during which no discriminatory pattern of job assignments is alleged. As to section A assignments in general, Chaikow credibly testified that it was Respondent's policy to only assign that section to head waiters or those with the most seniority and skill "because they have to perform a lot more work than anybody else."<sup>23</sup> Further, and specifically contradicting Krivan, Chaikow testified that Krivan was never assigned to section A during 1979 because he did not like to remain in the restaurant when there were no more occupied tables. Krivan did not deny this testimony.

Despite the above evidence to the contrary, Krivan asserted, as proof of his poor station assignments, that his tip income dramatically decreased—"It was about \$20 or \$30 an evening less." Explaining his statement, Krivan testified, "The amount of business varies each evening, and each weekend and each day. In different sections you are going to generally make less money, is what I mean. Just because E on one night might be more money than an E on another day doesn't mean that I didn't lose money. It's relative to what everybody else made in the restaurant in terms of how much business we had that day." However, the only evidence, which was offered to support Krivan's claim of reduced tips—his own daily diary of 1979 tip income—does not substantiate his testimony. Rather, comparison of his post-August 15 tip income with comparable 1979 workweeks establishes that his tips after August 15 were, at least, equal to, if not slightly higher than, other periods. Thus, while Krivan believed that he began receiving discriminatory assignments after August 22, his tips for 4 workdays during the week of August 22 totaled \$200. In contrast, during 4 days of work in each of the weeks listed below Krivan earned tips as follows:

<i>Week of</i>	<i>Tips (total)</i>
6/28/79	\$181
7/5/79	\$166
7/12/79	\$203

<sup>22</sup> Examination of Cacho's work stations after August 15 also reveals several assignments to sections D and B. In particular, I note that on Sunday, August 26, Cacho worked in section B during the dinner shift and, of course, that he worked section D on the night of September 1, a Saturday.

<sup>23</sup> The section A job duties included keeping the main wait station stocked with all necessary supplies and staying until closing even if no tables were occupied.



7/19/79	\$212
7/26/79	\$180
8/1/79	\$182
8/15/79	\$143

When confronted with these figures at the hearing, Krivan averred that he would have earned more during the week of August 22 if he had been assigned to strong areas.<sup>24</sup> What seems closer to reality—and the truth—is head waiter Chaikow's denial that tip income is dependent upon section assignment; rather, "it depends upon the individual's ability."

As another example of Respondent's unlawful conduct after—and as a result of—the filing of the objections, the amended consolidated complaint alleges that Respondent "condoned" a pattern of general harassment and denigration by employees of union adherents—namely, Krivan and Cacho. Krivan testified that, after the filing of the objections to the August 15 election, he began encountering problems with placing and receiving his food and drink orders. While not alleging instigation by Respondent in either instance, Krivan further testified that Pitter was aware of his problems, did nothing, and, in fact, may have encouraged said conduct by an overtly hostile attitude toward Krivan. As to his food orders, Krivan asserted that these were being prepared improperly, often delayed, and occasionally not prepared at all. As a result, according to Krivan, he faced hostility from his customers who often had to wait abnormally long periods for their food, or received incorrect orders, or would be forced to eat cold food. To protect himself, Krivan began specifying on the customers' checks what problems he encountered in serving them.

Krivan further testified that he was not reticent about complaining to the kitchen personnel about his difficulties, with most of his complaints directed to Peter Paccone, who, according to Krivan, worked at the order window, controlled the order tickets, and coordinated all food leaving the kitchen. Krivan states that over one 3- or 4-night period, he made 20 separate order complaints to Paccone and that the latter gave him no adequate response—"He would smile." On one occasion—August 28 or 29—with a customer waiting longer than normal for a steak order, Krivan complained directly to Pitter. The latter immediately went to the kitchen and instructed Paccone to cook Krivan's order. On another occasion, however, Krivan allegedly complained to Pitter about not receiving pasta orders; Pitter, according to Krivan, was "unresponsive." As to the reason for his problems with Paccone, Krivan contended that the former "was very vocal about his opposition" to the Union. During cross-examination, while reiterating that he complained

to Paccone at least 20 times, Krivan recanted his earlier testimony that these were made over a 3- to 4-day period; rather, they were spread over two weekends. Also, Krivan admitted being extremely critical of Pitter's early job performance.

Cacho corroborated Krivan as to food problems, testifying that he often picked up orders with the food improperly prepared or with wrong side orders. As did Krivan, Cacho blamed most of these problems on Peter Paccone "because it seemed that he had a lot to do with the areas where the problems occurred." Cacho further testified that he complained to Pitter about his problems, showing him the customer checks or the badly prepared food. According to Cacho, Pitter would respond that cooks "are human, they make mistakes."

During his testimony, Peter Paccone did not deny—and, in fact, candidly admitted—that the above problems may have occurred. Thus, he testified that he had just been hired in late June and that, although hired as a saute cook, he had never previously done such work and encountered many performance problems. As a result, waiters, including Krivan, were constantly complaining about orders being delayed or misread and food being improperly prepared. While denying intentionally refusing to cook or sabotaging orders, Paccone admitted arguing with Krivan over food orders, losing orders in sauce pots, and being counseled by Pitter regarding his job performance.

Besides food order problems, Krivan asserted that he experienced difficulty having his bar orders filled after August 22. According to Krivan, the main source of these problems was bartender Eddie Dupont. Krivan testified that after the objections were filed and posted on the bulletin board, his customer drink orders would be returned half full, frozen, watery, or not filled at all and that these problems occurred "all the evenings I worked" after August 22. While not complaining to Pitter, Krivan allegedly did complain to Chaikow and Dupont with regard to his bar order problems. While, according to Krivan, Dupont made no response, Chaikow did speak to Dupont; however, the situation did not change. Finally, as to both his food and drink problems, Krivan admitted that on all occasions he eventually received the correct order "after a long period of time elapsed."

According to Cacho, he also experienced trouble with bartender Dupont. Contrary to Krivan, however, Cacho's problems with Dupont, which problems primarily concerned the latter regularly placing Cacho's bar orders behind those of other waiters, began prior to the election and originally were a joke between the two of them. Cacho further testified that Dupont once admitted to him that Cacho's union activities were the source of the friction between them. Dupont was not called as a witness by Respondent; consequently Krivan's and Cacho's bar order problems are uncontroverted.

As a last instance of alleged condoned conduct, Krivan asserted that unknown individuals wrote graffiti over union-related literature which he posted on the employee bulletin board and that someone inserted the epithet "asshole" across his work schedule for the week of

<sup>24</sup> Cacho also asserted that his tip income suffered from the allegedly poor assignments. However, he contradicted Krivan as to the nature of the problem. While the latter argued, with no supporting evidence, that the scope of the discrimination could only be established by comparing his tip income to that of other waiters on any evening after August 22, Cacho would establish the discrimination by comparing his pre- and post-election tip totals. "[The discrimination] cut it down. It cut my tips down and my take home pay . . . close to 50-percent." Cacho later contradicted himself during cross-examination regarding this 50-percent figure, admitting it may be closer to 30 percent. Finally, as did Krivan, Cacho reverted to the unsupported contention that other waiters "were making substantially more than me."

August 27. Regarding the latter incident, Krivan testified that he first became aware of the defilement of his schedule on Tuesday, August 28; that he spoke to Pat Roberts about the problem the next day; that the latter promised to correct the matter; that Respondent's "solution" was to place a small piece of cardboard over the word; that anyone could peer under the cardboard strip and observe what was written on the schedule; and that the matter was not finally resolved until a new schedule was posted 4 days later. Regarding this incident, Pitter testified that as soon as he noticed Krivan's schedule covered by a piece of schedule paper and what was written, he tore it down, and "I made a new schedule."

As to the food and drink problems of both Krivan and Cacho and other alleged harassment, the General Counsel does not contend that either Peter Paccone or Eddie Dupont acted as agents of Respondent. Rather, it is contended that "employees would not have been so brazen in their harassment of Krivan and Cacho if such action was not being tacitly, and in some cases, overtly encouraged by Respondent." In support, counsel for the General Counsel offered testimony from Krivan that, on August 29, Pitter approached him and said, "You are taking this too far. You ought to see a doctor." Krivan next testified that on September 1, shortly after he reported for work that night, he walked past Pitter on his way into the kitchen. Pitter, who did not see Krivan approaching, was softly singing "Joe must go, Joe must go." According to Krivan, cooks, who apparently were listening, saw him approaching and began laughing. During cross-examination, Krivan identified the cooks as Datz and Holbert; however, in a pretrial affidavit, he identified one of the cooks as Paccone rather than Holbert. Pitter denied the incident. As between Pitter and Krivan and as there is no corroborative testimony, I credit the denial of Pitter that the incident ever occurred. Finally, Krivan testified that, also on September 1, he overheard Pitter speaking to employee Karen Ohme by the bar. As he approached, Ohme said, "It makes me sick that he's still making money." Pitter agreed, and Krivan cleared his throat as he passed by. In a pretrial affidavit, Krivan stated that this incident occurred on August 29 and, during cross-examination, Krivan admitted that Ohme did not mention Krivan by name, that he walked up behind Ohme, and that "she was making the comment before she saw me . . . ." Pitter failed to deny either the August 29 incident or the latter conversation.

During his testimony, Howard Pitter specifically denied knowledge of either Krivan's or Cacho's alleged food and drink problems or that he ever instructed Paccone or Dupont to engage in their attributed conduct.<sup>25</sup> However, the record does disclose that Pitter was acutely aware of overt employee hostility toward Krivan and Cacho after the August 15 election. Thus, while denying knowledge of specific acts other than the "asshole" epithet on Krivan's work schedule,<sup>26</sup> Pitter admitted that he

sensed "in the air" after the election that employees were not as friendly toward Krivan and Cacho as before and overheard conversations to that effect; that employee resentment of them manifested itself in the "cold shoulder" treatment; and that he believed the sources of this attitude were Krivan's and Cacho's strong support of the Union and its loss of the election. The record further discloses that while aware of the friction, Pitter made absolutely no effort to stop it. Thus, he admitted, "There's not much you can do about a cold treatment." Also, while admitting that the problem concerned him, Pitter believed "everything would blow over." Finally, Pitter disavowed any sharing of, or support for, employee hostility toward Krivan or Cacho, averring that he, at all times, maintained a "professional attitude" toward the two union adherents.

### 3. The discharge of Joseph Krivan

Krivan's last day of work was Saturday, September 1. He was scheduled to work from 6 p.m. until closing and was assigned by Chaikow to work at section E. Krivan testified that he took his normal lunch break from 9 until 9:30 p.m. and that at approximately 11:50 p.m. Chaikow "cued"<sup>27</sup> him for his second break.<sup>28</sup> At the time, Krivan had two unfinished tables, and he walked over to the wine press to total the checks.<sup>29</sup> While doing so, he spoke to Cacho, and as they conversed, Peter Paccone approached Cacho from behind and poured spaghetti sauce down Cacho's back.<sup>30</sup> Cacho immediately walked over to the main wait station with Paccone in pursuit, picked up a soup ladle, dropped it, and just left the restaurant.

According to Krivan, the incident upset him. Thereafter, he returned to his work station and was taking excess bread back to the kitchen when the cashier yelled that he had a telephone call. Cacho was the caller, and he cautioned Krivan to just forget the above incident. However, as he was returning to section E, Krivan passed Chaikow and informed the latter that he was not sure he would work any more that day because he had had enough for the evening. Chaikow told Krivan to keep him informed so that he could assign someone else to section E.<sup>31</sup> At that point and inasmuch as his section was then empty, according to Krivan, he wandered over to the main wait station. A minute later Chaikow approached and informed Krivan that two tables had just been seated in his section and asked if Krivan would wait on them. The latter replied, "I don't know what I'm

<sup>25</sup> In Respondent's system, "cuing" signifies that a waiter is to start preparing to take a break.

<sup>26</sup> Waiters normally are given two breaks during a shift—an unpaid half hour lunch break and a paid 15-minute break later in the shift.

<sup>27</sup> Krivan testified that the restaurant was "kind of emptying out" but that there were a few customers remaining.

<sup>28</sup> There is no dispute about this specific incident. The record discloses that earlier that evening Cacho and Paccone had some sort of an altercation near the kitchen.

<sup>29</sup> There were 11 waiters assigned to work that night with everyone scheduled to leave at midnight except Krivan, Cacho, Chaikow, Dave Jackson, and Pow Purgsaphakorn. Thus, after Cacho left, there were only three regular waiters to serve the entire facility. Pitter testified, "It was busy for four waiters. I mean not super busy . . . but busy for four waiters. I needed four waiters on."

<sup>25</sup> Pitter credibly testified that waiter complaints about wrongly prepared food orders are commonplace in the restaurant.

<sup>26</sup> Pitter did not specifically deny that Krivan complained to him about problems with his food orders.

going to do. I think I want to leave and I think I want a break. But I had enough for the evening. So [Chaikow] said okay and walked away."<sup>32</sup> Immediately thereafter, Pitter approached Krivan and said, "You've got two tables in your section. Are you going to wait on them?" Again I said, "I had enough for the evening. I don't know what I'm going to do. I think I want a break. I don't know what I'm going to do." Pitter then stepped away, looked over toward section E, walked back to Krivan, and said, "Well, if you don't want to wait on the tables, you quit." Krivan denied that he was quitting and reiterated that he did not know what he was going to do but that he was not quitting. Pitter responded that Krivan had indeed "quit," took the latter's timecard, signed it, and ordered Krivan to "get lost." Pitter then walked away. Denying that any waiters approached and pleaded with him to stay and wait on his tables, Krivan remained at the restaurant for at least half an hour before leaving. Just before doing so, Pitter walked over to him, asked why he was still there, and ordered him to leave. Krivan responded that he had not quit; Pitter replied that he had; and, according to Krivan, he thereupon left the restaurant.

The record establishes that Krivan has given contrary accounts of the events of that evening. Thus, in a pretrial affidavit dated November 14, Krivan stated that it was Pitter who first notified him that two new tables had been seated in section E, but in an affidavit dated November 19 and at the hearing, he identified Chaikow as that individual. Also in the November 19 affidavit, Krivan placed Pitter "a little ways behind" Chaikow when the latter spoke to him for the second time that night; however, during direct examination Krivan said nothing about Pitter's presence, leaving the impression that the latter was nowhere nearby. Finally, in the November 19 affidavit, Krivan quoted Pitter as asking "Was I leaving," while he failed to mention this question during his testimony.

Chaikow testified that after Cacho left that night, the restaurant was less than half full (16-17 active tables) but that just three waiters—besides himself—remained on duty. He further testified that he became aware that two new tables had been seated in Krivan's area but that the latter was not servicing them. Chaikow located Krivan near the wine arbor and instructed him to wait on the tables. Krivan replied, "I don't feel like staying. I'm not sure if I'm staying." Chaikow reminded Krivan that he was scheduled until 1 a.m. but Krivan again refused to wait on the tables. Chaikow then asked if Krivan was quitting, and after the latter said no, Chaikow went to find Pitter.

Finding Pitter, Chaikow told him what had just occurred and asked Pitter to speak to Krivan about waiting on the two new tables in his section. Thereafter, while he overheard nothing, Chaikow observed the following sequence of events: Pitter spoke to Krivan; waiters Dave Jackson and Pow Purgsaphakorn next spoke to Krivan; and Pitter again spoke to him. Chaikow concluded,

<sup>32</sup> Krivan had no knowledge whether, in fact, new tables had just been seated in his section.

denying that he cued Krivan for a second break that night.

Howard Pitter testified that he first became aware of any problem in the dining room when Peter Paccone entered his office and informed Pitter about the Cacho incident. Pitter immediately went downstairs and was standing near the kitchen when Chaikow approached, reporting that "[Krivan] says . . . he's probably going to be leaving." Thereupon, Pitter looked into the section E area, observed two new parties who apparently were awaiting service, and went looking for Krivan. Finding him near the main wait station, Pitter told Krivan that there were two new tables in his section, but Krivan replied, "I'm not going to take them. I'm leaving. I've had it for tonight, I'm leaving." Pitter asked what Krivan meant and said, "Don't be silly. You've got orders to take. We're short to begin with. . . . please take the orders."

Krivan failed to either move or make any sort of response. Leaving him, Pitter walked over to waiter Dave Jackson and, according to Pitter, asked him to persuade Krivan not to leave. Jackson agreed, and Pitter waited 5 minutes to determine if Jackson could succeed. However, after speaking to Jackson, Krivan remained standing at the wait station. Pitter then walked over, again requested that Krivan wait on the new tables in his section, and warned that if Krivan just stood there, he (Pitter) would clock Krivan out just as if he stopped work and quit. Krivan replied that he was leaving but was not quitting. Thereupon, Pitter signed Krivan out.

Careful analysis of the testimony concerning the events of September 1 convinces me that the corroborative versions of Pitter and Chaikow are more logical and consistent with the surrounding circumstances. Thus, I do not believe that Chaikow would have so readily—if one credits Krivan's testimony—permitted Krivan to leave when only three waiters were available to serve the entire restaurant for, at least, an hour more. Also, I note that Krivan gave contradictory accounts of what occurred that night. Accordingly, I credit Pitter and Chaikow as to the events of Saturday night, September 1.

Evidently in an effort to establish that he had not quit the previous night, Krivan reported for work on September 2 at his normal starting time. While he was speaking to headwaiter George Loung, Pitter came over and asked what Krivan was doing there and, after Krivan indicated that he was ready for work, told Krivan that the latter had quit and demanded he leave the restaurant. A verbal altercation ensued, finally ending when Pitter forced Krivan out the door.

#### 4. The termination of Erich Frisch

Erich Frisch was first hired by Respondent in March 1978 as a saute chef and worked through December of that year. On a Saturday Frisch felt ill and telephoned the restaurant. A hostess answered the telephone and, according to Frisch, told him that no managers were on duty. Frisch asked her to leave a message for Pitter that he was ill and would not work that day. The next day when he reported for work, Frisch noticed that his time-

card was missing. He asked Pitter why and the latter responded that Frisch had "quit yesterday." When Frisch protested and explained what he had done, Pitter responded that Frisch should have spoken to a manager.<sup>33</sup> For the next 6 months Frisch was unemployed, then, in June 1979, Frisch unexpectedly met Pitter at another Berkeley restaurant and inquired about working on a summer vacation relief basis. Pitter said he would think about it and subsequently telephoned Frisch at the end of the month. Pitter explained that a cook, named Tang, was going on vacation and said he could offer Frisch work on a temporary basis until August 2. Frisch accepted, and Pitter said, "Just kind of watch your step." Pitter told Frisch to start on July 6 and set his wage rate at \$5.75 per hour.

Frisch started working again as a cook on July 6. On that same day, Krivan gave him an authorization card; Frisch immediately signed and returned the card to Krivan. The next day, as described above, Pitter interrogated Frisch as to possible union activities at the restaurant. On July 10, the day following the filing of the petition, Pitter again asked Frisch to come into his office. They were alone, and Pitter said that as soon as Tang returned from vacation, another cook, Roy Chuck, was scheduled to go. Pitter continued, saying that he wanted Frisch to cover for Chuck while the latter was away "and he asked me if I wanted to stay on permanently, and said he thought he could work a raise for me, get a raise to \$6.50 or \$7.00 or \$7.50 an hour." Frisch responded that it seemed good to him and told Pitter that he had received job offers from four other restaurants after he completed his summer relief work for Respondent.<sup>34</sup> Pitter ended the conversation, stating that he had "to talk to his lawyers about the raise because of all the union b—s—that was going on." Frisch responded that he would contact those other restaurants and refuse their respective job offers.

In early August, Frisch sought to obtain a loan from Wells Fargo Bank. Pursuant thereto, on August 10, he spoke to Pitter in the latter's office. Frisch handed him a "Verification of Present Employment" form, explained its purpose, and asked Pitter to complete it. Pitter responded that he would read it "and see what I can do." Subsequently, Pitter did so and returned the document to Frisch the next day. In the space therein marked "Probability of Continued Employment," Pitter wrote "POSITIVE." According to Frisch, he and Pitter again spoke regarding a raise on the last Friday in August. They spoke at approximately 6 p.m. in the back of the kitchen, and Pitter said, "We've decided to cut out the [Sunday buffet]. . . . By the way, you have a raise to \$6.25 an hour." Frisch thanked Pitter, and the conversation ended.

<sup>33</sup> According to Pitter, Frisch's conduct was violative of Respondent's call-in policy—that employees must communicate directly with a manager with regard to absences. Pitter admitted treating Frisch's termination as a quit "because he had the choice to come to work and he didn't come to work and did not call."

<sup>34</sup> Regarding these job offers, Frisch credibly testified that he received them soon after he agreed to work for Respondent during the summer. Three of the restaurants were in Berkeley—Martino's, The Good Earth, and International Cafe—and the other, Washoe Zephyr, is located in Reno, Nevada.

Frisch testified that on Sunday, September 2, his shift was scheduled to conclude at 5 p.m. At approximately 4:30 p.m., Frisch observed Krivan enter the restaurant, heard the latter and Pitter shouting at each other, and ultimately observed Pitter force Krivan out the front door of the restaurant. A few minutes later, Frisch observed police officers enter and speak to Pitter and George Loung. By that point his shift had ended, and Frisch walked outside. On the sidewalk in front of the restaurant, Frisch observed Krivan, Cacho, Cacho's girlfriend Leslie, and four or five others carrying signs and walking in front of the restaurant entrance. The signs read "Honk if you're with us" and "Giovanni's unfair to labor." Frisch approached Krivan and asked him what had happened inside the restaurant. Several of the pickets then asked Frisch to join them but he refused, saying that he did not wish to become involved and that he wanted to remain neutral. At that point, Leslie, Cacho's girlfriend, asked him to hold her sign while she left to buy something. Frisch agreed, and she leaned the picket sign against his leg. Just then, Anna Schipani's brother Mark opened the front door, saw Frisch standing with the picket sign against his knee, turned around and said to someone inside the restaurant, "Hey, Erich's picketing." According to Frisch, "A few seconds later [Pitter] peeked out the door and saw me, and just kind of shook his head."<sup>35</sup> Deciding that Respondent would obviously conclude that he was a union adherent, Frisch joined in the picketing for the remainder of the evening.

Frisch worked the next 2 days without incident. Notwithstanding that September 5 was his day off and inasmuch as it was payday, Frisch went to the restaurant with Krivan and Cacho to obtain his paycheck. Eddie Dupont was handing out the checks but did not have a check for Frisch. Anna Schipani's sister told Frisch that she would get Pitter, and a few moments later the latter came downstairs from his office. Pitter handed Frisch his regular paycheck, a check for the previous 2 days, and 2 free dinner passes and said, "Roy is back. Vacation time is up. We don't need you anymore."<sup>36</sup> Pitter turned and started back upstairs. Frisch asked the former to wait, but Pitter responded, "I don't have time for you right now. I'm interviewing somebody upstairs."<sup>37</sup>

Contrary to Frisch, Respondent denies that it ever intended to hire Frisch on a permanent basis in 1979. Rather, it is asserted that Frisch was a particularly sloppy and hazardous cook and that, aware of Frisch's deficiencies, Pitter intended to employ him until the two cooks, Tang and Roy Chuck, completed their vacations. Further, Respondent denies any knowledge that Frisch engaged in picketing after 5 p.m. on September 2. In sup-

<sup>35</sup> In his pretrial affidavit, while stating that Pitter peered out at him while he picketed, Frisch failed to mention that Pitter shook his head in a negative manner. Frisch attempted to explain this discrepancy, citing his nervous state at the time of the affidavit. However, he admitted having made other substantive changes in the affidavit before signing it.

<sup>36</sup> Frisch admitted that neither check reflected the raise allegedly promised by Pitter. Moreover, there is no evidence that Frisch was replaced by any other cook.

<sup>37</sup> Frisch testified that in August he saw an advertisement in the Sunday San Francisco Examiner/Chronicle by Respondent for various categories of employees, including cooks.

port, Pitter testified that, during his employment in 1978, Frisch was sloppy and careless in his work and would not readily take orders.<sup>38</sup> Kirke Byers, one of Respondent's head cooks, testified that while he worked alongside Frisch in 1978, he observed the latter to be overbearing, unclean, dangerous, and a hazard to other employees while frying foods because of a propensity to splatter grease and, thus, cause burns. Despite this rather negative assessment of Frisch's performance, Byers could recall only a single instance of hazardous cooking—in which Frisch was cooking with too high a flame and while tossing food into the air, splattered grease onto two nearby cooks. Finally, contrast Byers' testimony with that of John Schipani, who admitted that he observed Frisch's work enough to form a conclusion:

JUDGE LITVACK: Well, Mr. Schipani, did you ever see Frisch's performance in the kitchen? Did you ever observe him working?

THE WITNESS: Yes.

Q. What type of cook was he? . . .

A. I'd say he was talented.

\* \* \* \* \*

Q. What do you mean by a talented cook?

A. I'd say he has a feel for working in a restaurant. . . . He basically has the feel for cooking, but he's just about the sloppiest person you could ever see in the kitchen.

\* \* \* \* \*

Q. All right. Well, did you think he was dangerous to other employees in the manner and method by which he [would] saute food?

A. No.

While not disputing the circumstances surrounding Frisch's rehiring in June 1979, Pitter contends that he did so because "I felt like I'd help him out." and that he would not have hired him but for Frisch's ability to cook saute. Pitter further asserts that there was no question but that Frisch was rehired solely as a summer replacement. Thus, according to both Byers and Pitter, the former informed Pitter that he would not assent to rehiring Frisch unless it was understood that such was only upon a temporary basis. In these circumstances, Pitter denied ever offering either permanent employment or a raise to Frisch during the summer of 1979. However, Pitter did recall a conversation in early August with Frisch during which the latter inquired about both permanent employment and a raise. According to Pitter, he evaded the questions by saying he would have to check with others. With regard to Frisch's performance during the summer, Pitter averred that he was "still old Erich," with the same type of complaints as in 1978. Despite this, Pitter admitted that in his aforementioned August conversation with Frisch, "I said, you're doing fine." Asked to explain, Pitter stated that he meant Frisch was doing better but was still below average. Finally, while admitting his answer on the Wells Fargo Bank loan document,

Pitter testified that he was merely trying "to help Erich out . . . to help him get a loan." Pitter further testified that he had completed such documents in the past. Asked whether he had ever lied on such a document, Pitter responded, "I don't know. I could have."

As to Frisch's picketing, Pitter testified that he was unaware of Frisch's union adherence until he observed Frisch picketing on the day *after* he was terminated—September 6. As to the events of September 2, while freely admitting that he looked outside that evening and observed Krivan and others picketing, Pitter staunchly denied observing or even hearing from others that Frisch was also picketing the restaurant. While never wavering in this testimony, Pitter admitted that the picketing that night was an "upsetting factor"; that employees would peer outside at the picketing periodically throughout the evening; that the entire restaurant staff was worried and even scared by the picketing; that the picketing was a big thing; and that the restaurant had never before been picketed during his tenure there. Finally, Pitter testified that Frisch's termination had nothing whatsoever to do with the Union; rather, "Vacations were over."

## B. Analysis

### 1. Joseph Krivan

The amended consolidated complaint alleges, and counsel for the General Counsel argues in his post-hearing brief, that subsequent to the August 15 representation election, which the Union lost, and objections to the conduct thereof, Respondent, directly and indirectly through condonation and encouragement of employee conduct, embarked upon a pattern and practice of unlawful discrimination, in violation of Section 8(a)(4), (3), and (1) of the Act, against employee Krivan, one of the two main union supporters, which campaign culminated in his discharge on September 1. More specifically, it is alleged that Krivan and Bernard Cacho were the only avowed union adherents among Respondent's employees; that General Manager Howard Pitter harbored unlawful animus toward Krivan and Cacho; that prior to the election, Pitter and Anna Schipani had engaged in a blatantly unlawful campaign to defeat the Union; that subsequent to the election, Respondent retaliated against Krivan and Cacho by consistently assigning them to less active—and financially unrewarding—waiter stations; that Pitter condoned and encouraged employee harassment of Krivan and Cacho because of their strong union support; that Pitter, bent upon retaliation against Krivan, precipitously terminated the latter for his "momentary indecision" about continuing to work after the Paccone-Cacho incident on September 1; and that, in the alternative, Krivan's alleged "quit" was, in reality, a "constructive discharge" based on the intolerable and onerous working conditions created by Respondent. Contrary to counsel for the General Counsel, Respondent contends that there exists no record evidence to warrant the conclusion or inference that Respondent either discriminatorily assigned Krivan to poor waiter stations as a result of his union activities and the filing of objections to the August 15 election or indirectly condoned employee ha-

<sup>38</sup> To Pitter, Frisch was merely a "below average" cook.

harassment of Krivan, that Krivan refused to work and, indeed, quit work on September 1, that Respondent's working conditions did not justify such action, and that, if terminated, Krivan was terminated as a result of his refusal to work.

At the outset, I agree with the contention of counsel for the General Counsel that Krivan, rather than quitting Respondent's employ on September 1, was terminated by Howard Pitter. The record supports—and, indeed, warrants—the conclusion that Pitter rather loosely utilized the term “quit” to place the onus for the result of precipitating conduct squarely on the employee rather than on Respondent. Thus, in December 1978 what obviously was the termination of employee Erich Frisch for having violated Respondent's absence policy was treated by Pitter as a quit apparently because Frisch had a choice of reporting or not reporting for work. Likewise, if Krivan refused to work on the night of September 1, he was discharged for that reason, he did not quit merely because he had a “choice” of working or not working. Moreover, while Krivan may have engaged in conduct warranting discharge, it can hardly be said that his conduct that night evidenced any intent by Krivan to sever his employment relationship with Respondent. Accordingly, while Respondent may not have specifically stated that Krivan was discharged, the record does warrant that conclusion. *Sentry Investigation Corp.*, 249 NLRB 926 (1980).

The primary question herein concerns Respondent's motivation in discharging Krivan—was Restaurant Manager Pitter bent upon revenge after the election for Krivan's acknowledged union adherence and for the subsequent filing of objections to the election? Analysis of the arguments of counsel for the General Counsel establishes the close linkage of Respondent's alleged conduct in assigning Krivan to less desirable work stations, in condoning blatant employee harassment of him, and in ultimately discharging him. The main point of said arguments is, of course, that each of the above acts evidences Respondent's—and Pitter's—unlawful animus toward Krivan. However, to accept this contention, one must also acknowledge the converse as true—that if the assigning of Krivan to less desirable work stations and the condoning of employee harassment did not occur or were not unlawfully motivated, then it cannot be said that the discharge of Krivan was Respondent's ultimate act of retaliation for his union and other protected concerted activities.

Analysis of the record, pertaining to the allegation of the amended consolidated complaint that Respondent discriminatorily assigned Krivan to less desirable work locations after August 15 because of his union activities, reveals that the only supporting evidence for said allegation are the assertions of Krivan and Cacho that such was, indeed, the case. There is not one scintilla of corroborative evidence in the record. Rather, the opposite appears to be true. Thus, headwaiter Chaikow's daily assignment diary for the month of August 1979 was unchallenged and uncontroverted by counsel for the General Counsel and clearly establishes that, contrary to the assertions of Krivan and Cacho, they were often assigned to the more desirable waiter stations—sections B and

D—after August 15 and that said assignments were, even on weekends, the most lucrative time of the week. Moreover, while both employees contended that their respective tips were drastically reduced as a result of Respondent's conduct, analysis of Krivan's own tip records discloses that his tips for the week of August 22 were equal to, if not greater than, comparable weeks during calendar year 1979. Further, I specifically credit the logical and plausible testimony of Chaikow as to his method of assigning work stations in general and as to his rationale for the section assignments to Krivan and Cacho after August 15 in particular—rationale which is completely devoid of any unlawful motivation. Attempting to place the unsupported testimony of Krivan and that of Cacho in the best light possible, counsel for the General Counsel argues that neither the documentary evidence nor Chaikow's otherwise plausible testimony reflects or takes into consideration such assignment factors as the number of waiters working on any given night, the locations of other waiters, and the obvious “pecking order” of work locations and seating preferences. However, whatever merit there may be to utilizing these factors, the fact remains that the General Counsel just has not established that Krivan and Cacho were regularly assigned to more onerous or less desirable work stations after August 15, notwithstanding Respondent's motivation or even that either suffered reduced tip income after that date. Accordingly, there has been no discriminatory conduct in that regard, and I shall recommend that paragraph 7(a) of the amended consolidated complaint be dismissed.

As to Respondent's condonation of employee harassment of Krivan and Cacho because of their union activities, the record establishes that the only specific acts of harassment involved are the problems of Krivan and Cacho in obtaining proper and prompt food-and-drink orders; the placing of graffiti upon Union-related literature, which was posted by Krivan; and the writing of the epithet “asshole” on Krivan's work schedule. As to their food order problems, both Krivan and Cacho point to Peter Paccone as the source and allege as the latter's motivation his vehement antiunion attitude. While denying any sort of deliberate sabotage of food orders, Paccone candidly admitted that, because of his inexperience in performing such work, he caused and was the source of many food order problems in the summer of 1979; that food orders were often lost or wrongly prepared; that many waiters, including Krivan, complained to him about his work; and that Howard Pitter also spoke to him about his performance. As between Krivan and Paccone, I credit the testimony of the latter as being more reliable. Moreover, there is no evidence that Pitter either instigated or condoned Paccone's behavior. Rather, even Krivan admitted that, after complaining to Pitter about Paccone on one occasion, Pitter walked into the kitchen and spoke to the cook. Finally, given the fact that he had just recently been hired, it is hardly conceivable that Paccone could have been as much in control over the kitchen affairs as contended by Krivan and Cacho.

Concerning their alleged bar order problems, Krivan and Cacho testified that the source of these was bartender Eddie Dupont, and Cacho asserted that Dupont's mo-

tivation was his (Cacho's) union activities. Respondent did not call Dupont as a witness; accordingly, the testimony of Krivan and Cacho is uncontroverted in this regard and credited. However, while Dupont may have unduly harassed the two union adherents, remaining unresolved is Respondent's knowledge and alleged condonation of this conduct. Initially, I note that there is no evidence that Howard Pitter was aware of Dupont's activities, and I credit his denial in this regard. Further, Krivan testified that what complaints he did register with regard to Dupont were made to Dupont himself, who did not respond, and to Chaikow, who, admitted Krivan, did speak to Dupont on the former's behalf. As to Cacho, he could not recall having complained to management about Dupont. Thus, there is simply no record evidence that Respondent condoned, encouraged, or even was aware of the conduct of Dupont toward Krivan and Cacho.

Krivan next asserted that unknown persons wrote graffiti over union-related information, which he posted on the employee bulletin board, and that someone inserted the word "asshole" on his work schedule. There is no evidence that Respondent was aware of the former; as to the latter, I credit the testimony of Pitter that he removed the schedule from the wall after he noticed Krivan's schedule and the piece of cardboard thereon, covering the epithet.

Counsel for the General Counsel next argues that through its "words and actions," Respondent transmitted a signal to nonunion employees that harassment of Krivan and Cacho would be tolerated and that employees would not have been so brazen in their conduct if it was not "tacitly" or "overtly encouraged" by Respondent. At the outset, I note that while counsel for the General Counsel speaks of a "whole panoply of anti-union conduct" by Respondent's employees against Krivan and Cacho, the record discloses only the conduct of Eddie Dupont, the writing of graffiti on union-related literature, and the word "asshole" on Krivan's schedule—of which Respondent was aware of just the latter. Nevertheless, counsel for the General Counsel points to the testimony of Howard Pitter and asserts that it is vague and contradictory with regard to knowledge of acts of harassment against Krivan and Cacho. I agree; however, the burden is on the General Counsel to establish Respondent's knowledge of specific acts of employee antiunion harassment. Other than Pitter's admitted knowledge of the "asshole" epithet, there is no such record evidence. Therefore, Pitter's testimony, that while he was aware of employee hostility toward Krivan and Cacho and believed its genesis was the union campaign and election result, the only apparent, to him, manifestation of this hostility was the overt "cold shoulder" treatment given to them, stands uncontroverted on the record and is credited. In support of its arguments, counsel for the General Counsel cites *Becton-Dickinson Company*, 189 NLRB 787 (1971), wherein the Board concluded that an employer knowingly acquiesced in and condoned antiunion harassment of union adherents by antiunion employees and held such to be violative of Sec. 8(a)(1) of the Act. However, close analysis of that decision reveals that employees informed supervisors of the specific

nature of each antiunion act and that supervisors specifically advised that the employer would do nothing. Herein, as discussed above, no such knowledge or condonation can be attributed to Respondent.<sup>39</sup>

Finally, I have specifically discredited Krivan's assertion that he overheard Pitter singing "Joe must go, Joe must go" before other employees. Also, I note that while Pitter's alleged conversation with employee Karen Ohme, during which she said, "It makes me sick that he's still earning money," and he agreed, was uncontroverted, its meaning is ambiguous, Krivan's name was not mentioned, and Ohme was utterly unaware of Krivan's presence. Thus, while it is alleged that Respondent transmitted a signal to antiunion employees<sup>40</sup> that harassment of Krivan and Cacho would be tolerated, the record just does not permit such an inference to be drawn, and I will not do so. Further, it might be argued that Respondent was under some sort of duty or obligation to "put a stop" to employee hostility toward Krivan and Cacho and that, by admittedly not doing so, Respondent acted negligently and "condoned" said conduct and, therefore, violated the Act. However, given the state of the record, I fail to see how Respondent could be said to have condoned acts about which it was unaware. Also, I do not believe that acts of omission, in such circumstances, constitute a violation of the Act. Moreover, to have investigated the source and extent of its employees' antiunion hostility may have caused Respondent to commit the identical type of interrogation alleged to be unlawful herein—a result certainly not in accord with the purposes and policies of the Act. Accordingly, I shall recommend that paragraph 6(p) of the amended consolidated complaint be dismissed.

As to Krivan's discharge, it is my conclusion that such was not the direct result of, or the ultimate act in, any sort of campaign of retaliation by Respondent against Krivan for the latter's union activities. Based on my above analysis, I do not believe that the record would support any finding that such a campaign was ever undertaken by Respondent. However, such is not to say that the General Counsel has not arguably sustained its burden of proof under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980)—that it must "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor'" in Respondent's discharge decision. Thus, Pitter admitted that he was aware that Krivan was one of the two leading

<sup>39</sup> In *Champagne Color, Inc.*, 234 NLRB 82 (1978), the Board found a violation of Sec. 8(a)(1) of the Act when a supervisor knowingly permitted an antiunion employee to harass a union adherent about a union and did nothing to stop it. Again, I note that a major factor in the Board's decision was the supervisor's knowledge of the content of the altercation—that it involved the union. As stated above, there is no evidence herein that Respondent was even aware of the alleged harassment.

Counsel for the General Counsel may argue that the Paccone-Cacho incident was similar in tone and effect to the incident in *Champagne Color* and, therefore, demonstrates that Respondent encouraged such conduct. However, there is nothing to indicate that any management officials observed the incident, that the incident concerned the Union, or that management believed it related to any antiunion harassment of Cacho.

<sup>40</sup> According to Krivan, he and Ohme, a relief waitress, had been friendly prior to the election; however, on the morning of the election, Ohme became rather distraught over the holding of the voting and blamed the entire matter on Krivan.



union adherents and that he believed Krivan was responsible for the evidence upon which the Union's election objections were based. Also, Pitter did not deny having commented to Krivan on August 29, "You are taking this too far. You ought to see a doctor."

While I believe that a *prima facie* showing of unlawful motivation may have been made, I also believe that Respondent effectively met its burden, demonstrating "that the same action would have taken place even in the absence of the protected conduct." At the outset, I have credited the versions of what occurred at approximately midnight, September 1, as testified to by Pitter and Chaikow. Analysis thereof convinces me, contrary to the contention of counsel for the General Counsel, that Krivan, rather than exhibiting "momentary indecision about working" after the Paccone-Cacho incident, consciously determined to leave the restaurant and not work any longer that night, adhering to said decision even though unwaited-upon customers had been seated in his section and despite repeated entreaties—and instructions—from Chaikow, Pitter, and fellow waiters to remain at work and service the seated customers. That it could hardly be said that Krivan was, in any way, indecisive about refusing to work is clear from his own words—after telling Chaikow that he did not feel like staying and was thinking of leaving, Krivan told Pitter, "I'm not going to [wait on the customers]. I'm leaving. I've had it for tonight, I'm leaving."

Having concluded that Krivan did, indeed, refuse to work when ordered to do so, the question remains—was his presence necessary to Respondent's operations that night. The record is clear that, when Cacho abruptly departed slightly before midnight, the restaurant was approximately half full (at least 17 tables) and that it would be open for 1 more hour. Moreover, other than headwaiter Chaikow, Respondent had scheduled four waiters to work until closing time—Krivan, Cacho, Dave Jackson, and Pow Purgsaphakorn. After Cacho left and Krivan was discharged, just two waiters remained to cover the entire dining room until, at least, 1 a.m. Minimizing the situation, counsel for the General Counsel asserts the two newly seated parties in Krivan's section were not being given unsatisfactory service; however, such is a too restrictive focus. Rather, I believe that, faced with the above-described situation for the remainder of the dinner shift, Respondent justifiably could conclude—as it did—that it required Krivan to work the remainder of his shift and that as an experienced waiter Krivan must also have realized the necessity of his presence—whatever his state of mind at midnight.<sup>41</sup> Accordingly, I think that Respondent has established a valid, persuasive economic justification for the discharge of Krivan whatever the latter's protected activities and that he would have been terminated in any event. *B. N. Beard Company*, 248 NLRB 198, fn. 5 (1980); *J. P. Ste-*

*vens & Co., Inc.*, 243 NLRB 10 (1979); *Computed Time Corporation*, 228 NLRB 1243, 1250 (1977). Finally, assuming *arguendo* that evidence existed of discrimination against Krivan in the assigning of work stations and of Respondent's condonation of employee harassment of him, I still would find that Krivan's discharge was motivated by his own insubordination on the night of September 1. *Jupiter 8, Inc.*, 242 NLRB 1093 (1979); *Marsh Furniture Company, Inc.*, 230 NLRB 580 (1977).

Counsel for the General Counsel makes two other arguments against said findings. Initially, he asks why Respondent did not seek to determine Krivan's reason for refusing to work. Without regard to the relevancy of such an inquiry, I believe the conclusion is warranted that both Chaikow and Pitter undoubtedly assumed that Cacho's leaving was the cause of Krivan's conduct. In any event, the *fact* of his refusal rather than the reason behind it is the important consideration. Next, it is argued that Respondent imposed the "ultimate" penalty of termination rather than some lesser discipline and that such clearly reveals Respondent's true motivation—Krivan's union activities. However, it is gainsaid "while the discipline may seem extreme, it does not follow that the ascribed reason for the discharge is pretextual." *J. Ray McDermott & Co., Inc.*, 233 NLRB 946, 952 (1977).

Based upon the above, and the record as a whole, I do not believe that counsel for the General Counsel has established by a preponderance of the evidence that Joseph Krivan was terminated by Respondent either because of his union activities or because he participated in the investigation of objections to the August 15 election and shall, therefore, recommend that these allegations of the amended consolidated complaint be dismissed.

## 2. Erich Frisch

Counsel for the General Counsel argues that, having offered permanent employment and a raise to him, Respondent discharged Erich Frisch only when Pitter became aware of his picketing activities on September 2 and, thus, because of Frisch's support for the Union. In so arguing, counsel for the General Counsel also contends that Respondent spuriously asserted that it had no knowledge of Frisch's picketing and that Frisch was not a permanent employee. On the other hand, Respondent argues that it had no knowledge of Frisch's support for the Union or picketing activities,<sup>42</sup> that, based upon his prior poor job performance, Frisch was hired—and continued to work—as a temporary replacement, and that he was discharged at the conclusion of the summer vacation period.

At the outset, I have previously concluded that, for the most part, Erich Frisch seemed to be a highly credible witness, and as between Frisch and Respondent's witnesses concerning the events of June through September 1979, with certain exceptions, I credit the testimony of Frisch. His version of the events of that period must be contrasted with aspects of Respondent's defense which

<sup>41</sup> Notwithstanding that he may have been "upset" over the Paccone-Cacho incident, one should not over-dramatize what occurred. Thus, other than the obvious damage to his clothing, Cacho was not physically injured, there was no shouting, no evidence that customers observed what happened, or that the restaurant operations were, in any way, disrupted. Further, nothing whatsoever happened to Krivan, and Cacho himself called and implored Krivan to forget the incident.

<sup>42</sup> There can be no doubt that Frisch engaged in protected concerted activities when he picketed outside the restaurant after the conclusion of his shift on September 2. *Edir, Inc. d/b/a Wolfie's*, 159 NLRB 687, 694 (1966).



seemed to be wholly illogical and hopelessly contrived. Thus, head cook Byers' description of Frisch's "hazardous" job performance was itself rather incredible, but when compared to the later, unwitting testimony of John Schipani, it appeared to be utterly exaggerated—if not fabricated. Likewise, Pitter's denial of knowledge that Frisch picketed outside the restaurant entrance on September 2 appears to be less than candid. Initially, I credit the latter's testimony<sup>43</sup> that he did engage in picketing that night and that Howard Pitter peered outside and observed his activities. Pitter admitted having observed the picketing and further admitted that the incident was an "upsetting factor," that the picketing caused great concern among the employees, and that the restaurant had never previously been picketed. In these circumstances, I believe that Pitter must have been aware that Frisch was picketing that night—especially since Frisch was the only employee-picket that night.

Concerning the validity of Respondent's central defense—that Frisch was simply terminated at the conclusion of the summer vacation period as had been understood when he was hired, counsel for the General Counsel points to my aforesaid conclusions and argues that the "total weight" of the evidence, therefore, supports a finding that Frisch, in reality, was discharged because Respondent believed he had joined with Krivan and Cacho as a union adherent. However, in his post-hearing brief, counsel for the General Counsel recognized the underlying problem with his theory—that Frisch himself admitted that he had been hired by Respondent on a temporary summer relief basis. The core issue, then, is whether Frisch's status was ever converted to that of a permanent employee. Put another way, was he ever genuinely offered permanent employment by Respondent? Initially, I credit the testimony of Frisch that he was called into the restaurant office by Pitter on July 10 and that the latter uttered the words: "And he asked me if I wanted to stay on permanently, and he said he thought he could work a raise for me, get a raise to \$6.50 or \$7.00 or \$7.50 an hour." The inquiry, however, does not end here. Rather, Pitter's intent in uttering these words is the determining factor—was he stating a genuine offer of employment, or was Pitter cleverly offering an inducement to a newly hired employee to forgo any support for the nascent union movement? If the latter is true, then it cannot be conclusively established that Frisch was a permanent employee, and his discharge on September 5 would have occurred in the ordinary course of events. Analysis of the record as a whole convinces me that at no time did Pitter intend to offer to Frisch permanent employment.

Initially, Frisch himself testified that he was hired on a summer vacation relief basis and that Pitter warned him to watch his step. I think that the inference is warranted that Pitter would never have made the latter statement if

there had existed no problems with Frisch's prior job performance. Next, the timing of Pitter's July 10 offer is important. Thus, I note that this conversation occurred a scant 5 days after Frisch began working (hardly a sufficient period during which properly to evaluate Frisch's job performance), just 3 days after Pitter interrogated him as to his knowledge of the union campaign, and 1 day after the filing of the election petition, and that Pitter's offer was stated immediately after he asked Frisch also to work through Roy Chuck's vacation. It is highly unlikely that any sort of offer of permanent employment could genuinely have been intended in these circumstances.<sup>44</sup> Rather, given Pitter's penchant for similar conduct during this time period, the conclusion is warranted and, indeed, inescapable that Pitter was attempting to dissuade a hopefully gullible individual from supporting the Union.<sup>45</sup>

Counsel for the General Counsel asserts that Pitter's answer on Frisch's loan application document is proof to the contrary. However, Pitter's reply was simply the ambiguous word "POSITIVE." Moreover, Pitter's explanation, that he was trying to help Frisch obtain the loan, is not implausible and, indeed, a likely one. Also, I specifically discredit Frisch's testimony regarding Pitter's offer of a raise in late August. I do so, noting that no such raise ever appeared in a paycheck to Frisch. Further, Frisch's discharge occurred exactly as originally scheduled by Pitter during the July 10 conversation, coinciding precisely with the return of Roy Chuck from vacation. Finally, there exists no record evidence that any replacement for Frisch was hired subsequent to his discharge and no record evidence, other than the timing, of any unlawful animus toward Frisch.

In short, the above-stated factors, and the record as a whole, convince me that Frisch was discharged in the normal course of his temporary employment and that while Pitter's July 10 offer of permanent employment and a raise to Frisch may have constituted an unlawful inducement to forgo supporting the Union, such was not intended as a genuine offer. Accordingly, notwithstanding the obviously overly zealous and, in part, fabricated nature of Respondent's defense and despite the timing of the discharge and Pitter's knowledge of Frisch's activities on September 2, I do not believe that the General Counsel has met its burden of proof to establish that Erich Frisch was terminated by Respondent because of his union activities and I shall, therefore, recommend that this allegation of the amended consolidated complaint be dismissed.

<sup>43</sup> While crediting Frisch that Pitter looked outside and saw him picketing, I specifically do not credit his testimony that Pitter also shook his head from side to side in a negative manner. Thus, I note that in his pre-trial affidavit, given 4 days after the incident, Frisch did not mention the foregoing. It is gainsaid that one's memory is fresher immediately after an event than 8 months later. *Flatiron Paving Company d/b/a Flatiron Materials Company*, 250 NLRB 554 (1980).

<sup>44</sup> In particular, why would Pitter offer permanent employment immediately after asking Frisch to work through Roy Chuck's vacation? Would he not, if a genuine offer was intended, have just offered permanent employment and not mentioned Chuck. I think the answer is obvious and believe Pitter was not serious. It is most unfortunate that Frisch believed Pitter and, accordingly, rejected other job offers.

<sup>45</sup> Counsel for the General Counsel points to Pitter's comment, regarding Frisch's job performance during the summer, that he was "doing fine" and asserts that such accurately portrays the latter's work. I view the statement in a different light, believing Pitter was attempting merely to satisfy Frisch while evading any specific response.

### 3. The alleged 8(a)(1) conduct

The amended consolidated complaint alleges several independent violations of Section 8(a)(1) of the Act. Considering the incidents in chronological order, it is first alleged that, during his July 7 conversation with Frisch, Pitter interrogated him regarding the union activities at the restaurant and threatened reprisals against the "Mexicans" because of their support for the Union. I have previously credited Frisch on this conversation and, other than a denial, Pitter offered no explanation for his conduct. I, therefore, find that Pitter violated Section 8(a)(1) of the Act by the aforementioned conduct. *Big Three Industries*, 252 NLRB 963 (1980); *B. E. & K., Inc.*, 252 NLRB 256 (1980); *Ben Franklin Division of City Products Corporation*, 251 NLRB 1512 (1980). Further, it is alleged that, during his July 10 conversation with Frisch, Pitter offered the former a raise and permanent employment in order to induce him not to support the Union. As previously stated, I credit Frisch as to this conversation. Further, while I do not believe that Pitter was transmitting a genuine offer of permanent employment, I do believe that his intent was to attempt to dissuade Frisch from supporting the Union. Accordingly, I believe Pitter's conduct was blatantly violative of Section 8(a)(1) of the Act. *Wm. Chalson & Co., Inc.*, 252 NLRB 25 (1980); *Chester Valley, Inc.*, 251 NLRB 1435 (1980).

It is next alleged that during her July 10 conversation with employee Carlos, Anna Schipani interrogated him about the Union and threatened action by the Immigration and Naturalization Service against employees because of their union activities. I have credited Bernard Cacho as to this incident over the version of Schipani. Accordingly, I find that Anna Schipani's statements were violative of Section 8(a)(1) of the Act. *Big Three Industries, supra*; *B. E. & K., Inc., supra*.

Next, the record establishes that during a July 11 conversation with employee Jose Cruz, Pitter interrogated him about the Union and solicited any "gripes or complaints" which the employee had. Likewise, the record further establishes that on the same day, or the next day, Pitter had a similar conversation with waiter Pow Purgsaphakorn during which Pitter asked the employee if he signed an authorization card and requested that Purgsaphakorn advise him of any complaints or problems which the employee might have. While denied by Pitter, I have credited the testimony of Joseph Krivan as to these incidents. Such conduct is, of course, violative of Section 8(a)(1) of the Act. *Ben Franklin Division of City Products Corporation, supra*.<sup>46</sup>

It is next alleged that, during his conversation with employees Krivan and Cacho in the last week of July, John Schipani told them that he would pay for an arbitrator if the employees agreed to the establishment of an in-house union—in order to induce them to forgo their

support for the Union. I have credited Cacho as to this conversation. He testified that, after disparaging the Union, Schipani raised the subject of an in-house union and offered to pay for the services of an outside arbitrator, who would settle the differences between Respondent and its employees. I find that such a promise of benefits is violative of Section 8(a)(1) of the Act. *Chester Valley, Inc., supra*.

The next two allegations of the amended consolidated complaint concern Pitter's conduct the day after Cacho interrupted and allegedly interfered with the meeting between Pitter and the Spanish-speaking employees in the boathouse. It is uncontroverted that, while Pitter first issued warning letters to Krivan and Cacho regarding the previous night, he later rescinded the warnings and, attempting to ameliorate relations with Krivan, placed a note in the latter's personnel file, specifying the absence of disciplinary material therein. In fact, the record establishes that Krivan himself persisted in arguing about the warning even while Pitter insisted that he would forget the entire incident.

As to the warnings themselves, I do not believe the record supports a conclusion that these were related to the union activities of Krivan and Cacho. Initially, while the warnings may not have been well thought out or perhaps were an overreaction to the conduct of the two union adherents, such does not make them violative of Section 8(a)(1). Further, the simple fact is that neither Krivan nor Cacho had any legitimate business interjecting themselves into Pitter's meeting with the Spanish-speaking employees. Neither was invited to attend or had any Section 7 right to be present. Moreover, if Pitter intended to threaten the employees with further Immigration Service harassment because of the Union—as speculated about by counsel for the General Counsel—or if either union supporter objected to what Pitter said, Cacho and Krivan possessed ample opportunity to communicate with the employees at a later time.<sup>47</sup> Accordingly, I do not believe that the rescinded warnings were based upon union considerations and shall recommend that paragraph 6(k) of the amended consolidated complaint be dismissed. Finally, inasmuch as I have credited Krivan's version of the nighttime conversation with Pitter and as the former failed to mention anything regarding the solicitation of grievances by Pitter, I shall also recommend the dismissal of paragraph 6(l).

It is next alleged that, during her conversation with Cacho on the night before the election, Anna Schipani interrogated Cacho as to his union activities and threatened him with unspecified harm if the Union was victorious in the election. I have previously credited Cacho's version of this incident but also note that Schipani's own version of the conversation closely corroborates Cacho. Further, while, given their nature, Cacho may have taken her remarks in jest, I do think that Anna Schipani

<sup>46</sup> Regarding the solicitation of grievances, it is gainsaid that the essence of the violation is not the solicitation itself, but rather the inference that the employer will correct the problems. This promise is implicit in the solicitation and need not be expressly stated. *Ben Franklin Division of City Products Corporation, supra*; *Madison Plant Mechanical Drives Division, Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44 (1971).

<sup>47</sup> Arguing that Pitter intended once again to threaten the Spanish-speaking employees with deportation or other action, counsel for the General Counsel asks why else would Pitter preface his remarks by stating that the meeting had nothing to do with the Union? The answer, of course, is obvious—to assure the assembled employees that the meeting, indeed, did not concern the Union.

was quite sincere, meant what she said, and understood the seriousness of her comments. Therefore, I find that Schipani's conduct interfered with, coerced, and restrained Cacho in the exercise of his Section 7 rights and, thus, was violative of Section 8(a)(1) of the Act. *Big Three Industries, supra; B. E. & K., Inc., supra; Ben Franklin Division of City Products Corporation, supra.*

#### THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union membership, activities, and desires and the union membership, activities, and desires of their fellow employees; by promising its employees economic and other benefits in order to dissuade them from joining or assisting the Union; by threatening retaliation, deportation, or other unspecified reprisals against employees to dissuade them from joining or assisting the Union; and by soliciting grievances from employees and promising possible favorable resolution of them in order to induce them to refrain from joining or assisting the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

4. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not engaged in any unfair labor practices not specifically found herein.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:

#### ORDER <sup>48</sup>

The Respondent, Caffè Giovanni, Inc. d/b/a Giovanni's, Berkeley, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union membership, activities, and desires and the union membership, activities, and desires of their fellow employees.

(b) Promising its employees economic and other benefits in order to dissuade them from joining or assisting the Union.

(c) Threatening retaliation, deportation, or other, unspecified reprisals against employees to dissuade them from joining or assisting the Union.

(d) Soliciting grievances from employees and promising possible favorable resolution thereof in order to induce them to refrain from joining or assisting the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Berkeley, California, restaurant copies of the attached notice marked "Appendix."<sup>49</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

<sup>48</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>49</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."